

Indiana Board of Special Education Appeals



Room 229, State House - Indianapolis, IN 46204-2798
Telephone: 317/232-6676

BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

In the Matter of C. H. and)
The School City of Hammond)
) **Article 7 Hearing No. 1296.02**
Appeal from the Decision of)
Dennis D. Graft, Esq.,)
Independent Hearing Officer)

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDERS

Procedural History

C.H. (hereafter, the "Student") is a student eligible for special education and related services, which he receives through the School City of Hammond (hereafter, the "School"). The request for this hearing was filed on June 18, 2001, on behalf of the Student and his Parents by counsel. In the request for the hearing, the Student asserted generally the Individualized Education Program (IEP) offered by the School was not calculated to provide him a free appropriate public education (FAPE) in the least restrictive environment (LRE). More specific disputes included, inter alia, access to educational records; the scheduling of case conference committee (CCC) meetings at a mutually agreeable date, time, and place; comprehensiveness of educational evaluations; extended school year services; CCC procedures for considering input from outside sources; behavioral intervention plan (BIP); staff training specific to the Student's needs; discipline; and implementation of the IEP.

Dennis D. Graft, Esq., was appointed as the Independent Hearing Officer (IHO) on June 21, 2002. The IHO contacted the parties to advise them of his appointment. By order dated June 28, 2002, he set July 8, 2002, for a pre-hearing conference. The pre-hearing conference was held as scheduled. The IHO issued a Pre-Hearing Order that date, clarifying the issues for the hearing. Hearing dates were established. The hearing was open to the public. The Student did not attend. Dates were established for the exchange of witness and exhibit lists. Witnesses at the hearing were to be separated. The parties were also advised of their other due process rights, including the right to compel the attendance of a witness.

The Student moved for a continuance on July 10, 2002, which was granted by the IHO on July 15, 2002. The School moved for a continuance on August 14, 2002, asserting that matters not included in the Pre-Hearing Order but discussed during the Pre-Hearing had not been achieved, to wit: The Student's counsel had not provided additional clarification to the School regarding the issues

designated for the hearing. The School also raised issues as to the availability of key staff for testimony at the scheduled hearing.

The IHO, by an Order dated August 15, 2002, denied the Motion for Continuance but did order the Student to provide the agreed-upon clarifications regarding certain issues enumerated for hearing in this matter, and to do so by August 20, 2002. The IHO issued a subsequent Order on August 19, 2002, directing the Student to provide the School the clarifications sought, and to do so by facsimile transmission no later than August 23, 2002.

The hearing eventually required seven (7) days. Written entries and orders indicate the progress in the matter and the agreement of the parties to additional dates for hearing. The hearing was conducted over the following dates: August 29, August 30, October 4, November 11, November 13, 2002; and January 15, January 16, 2003. The IHO's written decision was timely rendered on February 14, 2003.

The ten (10) issues for hearing were delineated by the IHO as follows:

1. Failure to provide a copy of the student's records, as requested by the parents, in a timely fashion and at the price stated in the school's handbook.
2. Failure to convene a case conference committee meeting at time and place that was mutually agreeable. In fact the parents were told that if they did not attend at the time and date specified by the school, which would only be set within a six-day window, that the case conference committee meeting would go on without the parents. Also, failure to convene a case conference committee meeting in a timely fashion resulting in IEP greater than one year old. Failure of the school to send a separate notice of case conferences to the student. Failure to keep a log required by Article 7 [511 IAC 7-17 *et seq.*] of attempts to contact the parents to schedule the case conference committee meetings.
3. Failure of the school to devise and provide an IEP calculated to confer meaningful educational benefit for the child. Failure to educate the student in the Least Restrictive Environment. Failure to devise a proper transition plan for the student.
4. Failure to provide needed evaluations and testing because of money problems, staffing problems and other issues not related to the student's needs.
5. Failure of the school to provide Extended School Year services to a child in desperate need of them, even though the school knew or should have known that the student needed ESY services in order to maintain any educational skills and prevent regression. The school's failure to provide extended school year services for the student has created a situation where he is allowed to regress in free-fall fashion during the summer months. His disabilities do not take a summer vacation, and therefore his education should not either. As a result of this failure, the student is entitled to compensatory education.

6. Failure of the district to allow the parents and their expert to participate meaningfully in the writing of an IEP, as evidenced by the school's writing of an IEP and presentation to the parents a week before the case conference committee meeting conferred and as evidenced by the school's failure to incorporate several perfectly sound suggestions from the student's parents and experts.
7. Failure to devise an appropriate Behavior Intervention Plan for the student.
8. Failure of the district to properly train its staff in the issues pertaining to the student's disabilities.
9. Failure of the district to prevent punishment of the student for incidents and issues that were manifestations of his disabilities.
10. Failure to follow the provisions of the student's IEP of May 9, 2001. Also, failure to convene a case conference committee meeting when a change of placement was imposed on the child in the transition from his school and when the child was suspended from school for more than ten days, which would constitute a change of placement.

Both parties were represented by counsel throughout the proceedings. The IHO attended to each motion and objection, ruling accordingly. The IHO, based on the evidence and testimony of record, determined forty-four¹ (44) detailed Findings of Fact, which are reproduced below, with slight amendments for continuity purposes:

1. The Student is a fourteen-year-old 9th grade student at a public high school. It is noted that the Student no longer resides in the school district that is a party herein. The Student's mother moved to a new school district prior to the start of the Student's 9th grade year, commencing August 19, 2002.
2. From an earlier age (three) the Student had outbursts at day care.
3. During the first grade, the Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and prescribed Ritalin.
4. The Student attended local general education classes through the sixth grade. He progressed from grade to grade, but he continued to have behavioral problems and struggled in class, especially in math. The Student's mother had requested, since the 3rd grade, that the School retain the Student or that he receive summer school, but neither occurred.
5. The Student had numerous behavior and school disciplinary problems during his sixth grade year (1999-2000), receiving a number of suspensions from school. The Student was involved in

¹The Hearing Officer Decision listed forty-two (42) Findings of Fact. However, numbers nineteen (19) and twenty (20) were used twice bringing the total Findings of Fact to forty-four (44).

counseling with a local mental health center during the Summer of 2000. This local mental health center had a therapist/counselor at most, if not all, of the school buildings in the School, pursuant to a contractual relationship to provide such direct services to qualified students. Based upon these concerns, the Student's mother had a psychological assessment of the student done. This assessment was done on July 17, 2000, at a local mental health center. On this assessment the student had a full scale IQ of 96, a verbal IQ of 104, and a performance IQ of 89. He had low average ability in arithmetic, weaknesses in digit span, visual motor coordination, and coding. The student was diagnosed with attention deficit hyperactivity disorder, intermittent explosive disorder, and depressive disorder. Further, the assessment did not rule out psychosis or bi-polar I disorder, mixed. Subsequent to the completion of the assessment, the mother met with the child's psychiatrist, who was the supervisor of the persons who had administered the psychological assessment and who informed the mother that the Student was bi-polar and prescribed medications for his bi-polar disorder.

6. In September, 2000, the Student was hospitalized for approximately one week due to suicidal actions (he cut his leg and wrist). Due to the September, 2000 hospitalization and problems, a [Sec.] 504 plan was developed for the Student on October 25, 2000. The School had been presented a copy of the July 17, 2000, evaluation and had been informed of the Student's medications. The Sec. 504 plan included: (1) a daily planner; (2) weekly progress reports; (3) a school counselor contact person if the Student needed assistance; (4) graded on work for the balance of the year, attendance and missed assignments to not be held against the Student; (5) seat the Student close to the teacher's desk; (6) redirect the Student when necessary; (7) isolate the Student from other students if focusing was an issue; (8) assist the Student with organization; (9) communicate extremes to the school counselor; (10) the parents were to structure homework time, monitor changes and communicate to the school and follow up with counseling and doctor appointments; and (11) the administration was to communicate with the parents on extreme behavior or excessive referrals.
7. The Student continued under the Sec. 504 plan and the counseling until January 30, 2001, when the Student was again hospitalized due to his suicidal threats. After a period of hospitalization, the Student was placed in the hospital's day treatment program.
8. While in the day treatment program, a case conference committee meeting was held on February 13, 2001. The case conference noted that the Sec. 504 plan of October 25, 2000 had minimal success, time-out (self-imposed) is effective with the student, and the IQ tests from the July 17, 2000 psychological assessment [were discussed]. Further, the student was administered the K-TEA on January 30, 2001 and had a standard score of 80 with a grade equivalent of 4.6 in math. This case conference included, by telephone, the hospital's educational liaison and psychiatric therapist. They noted that the student fluctuates in focusing on tasks/efforts, he had not been aggressive at the hospital, and that he was oppositional and had low frustration. The hospital recommended a smaller class size in an Emotional Disability (ED) setting, math assistance, redirection to remain on task, praise encouragement, reduced distractions, and out-patient services/counseling. The case conference noted that the student's new psychiatrist was looking at bi-polar disorder as a diagnosis and clearly the student was ADHD (hyperactive type). The case conference determined the

Student was eligible for special education services with an ED handicap. The case conference committee recommended a special education placement with special education instruction provided 100% of the day. The Student was placed at another school in the same school district, due to this school having a structured, small, self-contained classroom, whereas his home school did not.

The case conference committee noted that the Student was receiving outside counseling and services through the local mental health center at the parent's discretion. Further, the parents were to be notified if there were major mood swings or suspensions, and transportation was to be provided by the School. These components were placed in the student's individualized educational program (IEP).

The Student's class was with four other students with a teacher and aide in one classroom. The Student was segregated from the general education students at this school, starting and ending his school day at different times from the general education students. The Student had a time-out room and could go there when needed.

9. On March 29, 2001, a case conference was held to review the Student's educational program and his progress. The case conference committee recommended a change in placement from the small, structured setting to the School's ED classroom; and if the Student progressed in the ED program, then placement in general education classes was to be considered.

Although the Student's mother signed the consent for educational placement form, it did not indicate whether she consented or denied consent to the placement.

A new IEP was not written this date so the IEP of February 13, 2001, was still the one in operation.

10. On May 9, 2001, an annual case review conference was held. The Student had continued to progress and was by that date in some general education classes (based upon the evidence presented, it is unclear which and how many general education classes the student was in).

The Student was determined to again meet the eligibility criteria for special education services in the Emotional Handicap disability category. The IEP proposed placement in general education in all subjects but for math (with services in special education). However, the least restrictive environment of the IEP indicates special education full time (50%-0%), the Student needs the support of the special education classroom with smaller class size, classes are too large, and teachers lack the needed training. Further, it was noted that education in general education classes using supplemental aids and services cannot be achieved due to disruption to the educational progress. It was noted that the student will be separated from age peers for periods during the school day. Neither a general education nor special education teacher from his home school attended this conference.

Further, a behavior intervention plan (BIP) was developed for the first time as part of this IEP. However, a functional behavior analysis (FBA) was not done until May 30, 2001. Although there

was testimony of a prior FBA being required and done prior to placement at the small, structured educational setting, the FBA itself was never introduced into evidence, nor did the Student have a BIP set forth in his February 13, 2001, IEP

This IEP listed the Student's present math educational performance at G.E. 4.6. Also, under Related Services, mental therapy of 40 minutes/week by the School's contractor was to be provided at "School" and the Student was to receive daily transportation to "School." Finally, the need for extended school year (ESY) was not marked either yes or no. The Student's mother testified that she believed the Student would continue at this same placement and not his home school, so that if there were problems the Student could go back to the small, structured classroom setting.

The testimony of various school witnesses (teacher, case manager, and counselor) deviated from the mother's testimony and each others. Some indicated "School" meant the student's home school. Others testified the mother (or step-father) had indicated they may be moving so "School" was written to cover wherever the Student attended. However, the IEP makes reference to a specific counseling source, the one contracted with the School. Further, if the Student returned to his home school, transportation was not needed, due to his living across the street from his home school.

The Student's mother testified she requested ESY services. Various other witnesses said she did not make such a request, or if she did, it was denied since it was not needed. However, the IEP is not marked "yes" or "no" as to the need for ESY.

An Individual Transition Plan was developed for the student, since he was going to turn fourteen (14) during the next school year. The plan stated the student's goal would be working towards a diploma. His vision was a diploma and entering the military. There are no services noted to achieve the goal, nor specific courses of study to reach the goal. The mother agreed to this IEP without dissent.

12. After the May, 2001 case conference, the Student was suspended for a number of days, due to an incident with a substitute teacher. The Parent was not notified. After February 13, 2001, the student was suspended (in and out of school) without notice on every occasion to the mother.
13. Prior to the start of the 2001-2002 school year, the Student's mother called the special education case manager at the school where the student concluded the 2000-2001 school year. The mother inquired about transportation and when school would start. She was told that the Student would be attending his home school and she needed to contact the student's case manager at his home school. The mother did so and this case manager was not aware the Student was attending his home school. The case manager told the mother to have the Student report to her the first day of school and she would handle the situation. On the first day of school, the Student received his schedule of classes.

14. The Student's teacher of record (TOR), his math special education teacher, was not aware she would have him as a student until he arrived. The Student's TOR was in her first year of teaching and held only a limited license in special education. She did notify the Student's six general education teachers that the student was identified as EH and the case conference determination of modifications (although this form SE110-4 was not introduced into evidence). This teaching position was newly developed for the 2001-2002 school year.
15. During the first six weeks of the 2001-2002 school year, the student did fairly well in school. He received grades of: PE- scholastic-B+; effort-B; conduct-A; Language Arts- scholastic- C; effort-C; conduct-C; Reading- scholastic-B-; effort-A; conduct-A; Math- scholastic-C+; effort-B+; conduct-A+; Social Studies- scholastic-B-; effort-A; conduct-A; Science- scholastic-C; effort-B; conduct-A; Ind.Art- scholastic-D; effort-D; conduct-F.
16. In October, 2001, the TOR observed that the Student's performance and attention were sliding downward. The Student's grades for the 2nd semester were: PE- scholastic-A; effort- A; conduct-A; Language Arts- scholastic- D+; effort-C; conduct-B; Reading- scholastic-C; effort-B; conduct-D; Math- scholastic-D-; effort-D-; conduct-B-; Social Studies- scholastic-D-; effort-B; conduct-B; Science-scholastic-D; effort-C; conduct-B; Ind.Art- scholastic-C; effort-C; conduct-C.
17. The Student's performance and attention continued to diminish. His grades for the 3rd six-week grading period were: PE- scholastic-F; effort-F; conduct-F; Language Arts- scholastic- C-; effort-C; conduct-C; Reading- scholastic-C+; effort-B; conduct-F; Math- scholastic-F-; effort-D+; conduct-B; Social Studies- scholastic-P-; effort-B; conduct-B; Science-scholastic-F; effort-D; conduct-C; Art- scholastic-C; effort-B; conduct-B.
18. In December, 2001, the Student's mother contacted the TOR, requesting a tutor and any other help she could provide. Nothing happened. No one requested a case conference. The mother stated she was not then aware she could request a case conference.
19. In February or March, 2002, the Student's mother changed the student's therapist and psychiatrist due to their retirement or illness. The Student then started counseling twice per week. He had been attending therapy once per week since the prior year.
20. On March 12, 2002, a case conference was held upon the mother's request. The mother had spoken to the school's parent mentor, who informed the mother that she could request a case conference. Either the mother, or the parent mentor on the mother's behalf, requested this case conference. The purpose of the case conference was to discuss the Student's performance and the increased counseling. Review of the Student's performance established that the Student was not doing homework, which was affecting his grades. His behavior was acceptable in all classes but one. The school personnel felt the counseling during two mornings each week would negatively impact the Student's academics. The recommendations to address the homework and missing school part of two mornings each week were: (1) daily school agenda to be signed by the parents and teachers; (2) tutoring available three days per week before school; (3) reconvene as warranted;

and (4) parents again refusing services from the mental health center contracted with the School. There were no changes in the Student's placement or IEP.

21. The Student did somewhat better after March 12, 2002 and the increased counseling. His grades for the 4th grading period were: Vocal Music- scholastic-C+; effort-A; conduct-B; Language Arts- scholastic-D+; effort-C; conduct-C; Reading- scholastic-C-; effort-C; conduct-F; Math- scholastic-F-; effort-D; conduct-B+; Social Studies- scholastic-F-; effort-B; conduct-B; Science- scholastic-D; effort-A; conduct-B; Art- scholastic-D+; effort-C; conduct-B; and for the 5th grading period were Vocal Music- scholastic-B; effort-A; conduct-A; Language Arts- scholastic- D; effort-D; conduct-D; Reading- scholastic-C-; effort-C; conduct-D; Math- scholastic-C-; effort-C-; conduct-B; Social Studies- scholastic-C-; effort-B; conduct-B; Science- scholastic-C; effort-A; conduct-B; Com.Lit.- scholastic-D+; effort-C; conduct-C.
22. However, the agenda was a complete failure within a few weeks. The Student did start to receive tutoring services in Social Studies, but not in math.
23. On April 29, 2002, a Functional Behavior Analysis was done by three of the Student's teachers. The FBA described the student's behavior as severe in intensity, frequency and duration. His behavior was disrupting the class. He was still refusing to do classroom work, violated school/class rules, and had attendance and truancy problems. It was further noted that none of the rewards or interventions in the classroom worked.
24. Approximately one or two weeks prior to May 9, 2002, the TOR attempted to schedule the annual case conference with the Student's mother. However, the two or three dates proposed were not acceptable to the Student's mother, since she desired to contact her attorney about the attorney's availability or need to attend the case conference. Eventually, on or about May 12, 2002, the school counselor set this case conference for May 17, 2002. Notice of the case conference was addressed and delivered by the Student to the Student's mother on or about May 14, 2002. No separate notice inviting the student was delivered or prepared although the Conference Notice admitted into evidence stated the student had been invited.
25. On or about May 13, 2002, the mother received copies of the student's cumulative file at a copy rate of 50¢ per page. The student handbook for the LEA states a copying fee of 25¢ per page.
26. Prior to the scheduled case conference of May 17, 2002, a proposed draft IEP was sent to the student's mother. The LEA had instituted a computer-generated IEP (not handwritten) for the first time.
27. At the start of this case conference the Student's mother requested the case conference participants sign a sign-up sheet and answer three questions on childhood bi-polar. The mother also requested she be permitted to record the case conference. No one objected to the sign-in or recording. All of the other case conference participants refused to answer the three questions.

During the case conference the mother informed the other case conference members that the Student's psychiatrist and therapist were recommending a small, structured educational setting with

a general education curriculum. The other case conference members were recommending an IEP similar to the current IEP of May 9, 2001, all general education classes but for math, which was to be in special education.

During discussion of possible modifications/accommodations, the Student's mother supplied a document of proposed modifications/accommodations, which was taken from the book "The Bi-Polar Child." The mother believed the student needed such modifications due to his inattentiveness, inability to retain, and disorganization. After 2 ½ hours the case conference ended with it to be reconvened on May 21, 2002. The School participants in the case conference wanted to review the mother's proposed modifications/accommodations.

The Student did not attend the case conference at his mother's request, although he was over 14 and progressing to high school.

28. On May 18, 2002 the school psychologist sought releases from the mother to obtain records from the Student's therapist and psychiatrist. The mother executed the releases on May 20, 2002. The school psychologist did speak on the telephone to the Student's therapist once prior to May 21, 2002 and one time to the psychiatrist, most likely after May 21, 2002.

The therapist recommended a small, structured educational setting with a general education curriculum. The School never received written records concerning the Student from the therapist or the psychiatrist.

29. The case conference was reconvened on May 21, 2002, but an IEP was not finalized due to a lack of agreement on the program (small, structured setting with a general education curriculum vs. six general education classes and one special education class in math) and the proposed accommodations/modifications the mother requested vs. those of the School's participants at the case conference .

The case conference concluded with the mother to review the School's proposed modifications and advise if they were acceptable. The mother did not believe the program was appropriate and requested this due process hearing by letter dated June 17, 2002. The Student again did not attend the case conference, at the request of his mother.

30. The Student's 8th grade TOR noted that during the 8th grade the Student did well in guided practice (basically one-on-one) and tests, but in independent practice in class he did poorly. If the Student did not get the independent practice done in class, he would then have homework, which frequently was not done.

The TOR did not provide the Student's BIP to his general education teachers, and she did not know if any of them read the Student's BIP or IEP. The TOR did not attempt to visit or observe the Student in his general education classes, and her only real contact with the general education teacher was through progress reports. The TOR did not contact the mother about any problems but through report cards and progress reports.

Neither the special education case manager nor the school psychologist were aware of any problems the Student was experiencing during the 2001-2002 school year in any of his classes until the March 12, 2002 case conference.

The case manager was not aware until May 17, 2002 that the agenda in the March 12, 2002 case conference was a complete failure within a few weeks.

31. Each IEP listed the Student's current level of math as 4.6 GE. The student's 8th grade TOR believed, based upon his goals and benchmarks, that his math level was at 4.6 at the start of the 2001-2002 school year. The TOR taught the Student from 4th, 5th and 6th grade level work.
32. During the Student's 8th grade year after March 12, 2002, some of his general education teachers were not made aware why the Student was absent for parts of two mornings each week and initially counted the student absent and informed the Student that such absences could affect his grade.
33. The School had \$72,000.00 to \$100,000.00 to train staff and parents from a staff development program for the 2001-2002 school year. A periodic needs assessment was done to determine areas of training.
34. The School has a parent mentor on staff to assist parents in understanding Article 7 procedures, rights, and laws. Further, the parent mentor during the 2001-2002 school year had monthly or bi-monthly meetings for parents of special education students on various special education topics. The parents are sent notices of these meetings and the topics.
35. During May, 2002 the Student was again hospitalized for a short time, for one or two days, due to psychological problems. Further, during the end of the school year the Student was sent from one class to the assistant principal for four days due to his behavior, but the mother was never notified. Also, another teacher sent the Student, due to his behavior, from her lecture class a number of days each week. Again, the mother was never notified by the School.
36. On June 20, 2002, the student had a neuro-psychological evaluation by a child psychologist. The child psychologist diagnosed the student as ADHD and oppositional defiant disorder. He did not diagnose the student as bi-polar but did not rule this out, based on his limited observation. He found the student to have deficits in math, complex reading and comprehensive writing. This was due to the student's inability to break down complex tasks. The child psychologist recommended a structured educational setting with a one-on-one aide three hours per day and a tutor in his four major subjects two times per week for forty-five to sixty minutes per week. He believed that if the Student did not receive such support, he would become oppositional, withdraw, and not ask for help. He also believed that ESY was a wise choice for the student in math. He proposed six weeks of four to five days per week with two to three hours per day of instruction. He further believed that the School's staff needed to consult with a behavioral specialist to prepare the student's BIP.

37. On or about August 12, 2002, the Student moved to a different school district. A case conference was held on August 19, 2002, at the student's new school district. The case conference committee had available to review and consider the psychological assessment of July 17, 2000, the neuro-psychological evaluation done June 20, 2002, and, apparently, the unfinished IEP of May 21, 2002, which had been erroneously forwarded by the student's former School to his new school district as his most current IEP, rather than the May 9, 2001 IEP.

38. This case conference found the Student eligible for special education services in a small, structured classroom with a general education curriculum. An IEP was developed, although the mother testified she thought the IEP itself would not be finalized until the Student's teacher had the opportunity to interact with the Student to make appropriate recommendations. The Student's goals and objectives were taken from the unfinished IEP of May 21, 2002. The student was to be in five special education classes and two general education classes (P.E. and agriculture). This placement was to enable the Student, since he had the same curriculum as general education students, when he progresses to possibly be mainstreamed with the same curriculum.

The chair of this case conference opined that had he not received the neuro-psychological evaluation of June 20, 2002, he may not have thought such a program was necessary, but he was unsure.

Subsequent thereto, the new school district received the Student's file from the former School. Nothing contained therein changed the new school district's program.

39. During the first nine weeks at the new LEA for 2002-2003, the Student's grades were as follows: Life Science EH-C-; Food EH-C-; English 9 EH-C+; Math 9 EH-C-; PE-B-; Intro. To Ag.-A; Resource EH_____[sic]. At his new school district, the Student is seeing a therapist.

40. On December 13, 2002, a case conference was held at the new school district, based upon the mother's determination that an IEP had been finalized on August 19, 2002, to address the goals and objectives, since they were apparently taken from the uncompleted IEP of May 21, 2002. The goals in the IEP were changed to utilize memory techniques.

The Student's teacher recommended a speech/language evaluation, due to her belief that the Student may have a central auditory processing disorder.

41. On December 5, 2002, the Student was evaluated by a learning center. This evaluation disclosed that the Student had substantial deficiencies in concept imagery and recommended a program of three components: visualizing/verbalizing, to include following directions, problem solving, study skills and note taking; On Cloud Nine, a program of facts, concepts and procedures in math; and Seeing Stars (spelling and word attack). They proposed a learning program for the student of 160 to 200 hours at 4 hours per day 5 days per week during the summer at a cost of \$65.00 per hour at the site in Illinois and at \$59.00 per hour at a site in central Indiana.

42. The Student's grades for the second 9 weeks were; Life Science EH-C; Food EH-D-; English 9 EH-F; Math 9 EH-B-; PE-B-; Intro. To Ag.-C; Resource EH-P and the student's first semester grades were: Life Science EH-C-; Food EH-C-; English 9 EH-C-; Math 9 EH-C; PE-B-; Intro. To Ag.-C+; Resource EH-P.

43. During September or October of the student's 3rd, 6th, and 8th grade years, the Student took the ISTEP test. The student scored as follows in English and Math, with the Cut Score (required to meet the state's minimum education level for that grade in that area) as indicated below:

3rd grade

Student	Math-450	English-457
Cut Score	Math-479	English-475

6th grade

Student	Math-449	English-495
Cut Score	Math-479	English-480

8th grade

Student	Math-467	English-491
Cut Score	Math-486	English-486

Further, during the student's 5th grade he took the Terra Nova test. The student scored very deficient in math.

The TOR never received nor requested the results of the student's 8th grade ISTEP scores.

The Director of Elementary Curriculum and Test Coordinator for the School indicated that the Student's ISTEP scores were the best indicator of the Student's progress and current levels, and that all teachers should have access to these scores.

A Reading Specialist at the School stated that ISTEP is used to design instruction and insure students meet proficiency levels, and that reading is the foundation of all education, including math.

44. Various School witnesses opined at this due process hearing that they questioned whether the Student truly was bi-polar, since they had never received a definite statement of this medical diagnosis. The mother had never supplied such written diagnosis. It does not appear the School directly asked the mother for such documentation or releases until May 18, 2002. The School's psychologist, however, testified that the hospital therapist and educational liaison stated the Student was bi-polar in the February 13, 2001, case conference.

From these 44 Findings of Fact, the IHO determined the School did timely supply to the Student's mother the student's school records but did charge twice the copying rate as set forth in the School's handbook.

The IHO also determined there was no evidence of failure of the School to convene a case conference committee meetings at a time and place not agreeable to the parent but for the May 17, 2002, case conference committee meeting. As to the May 17, 2002, case conference committee meeting, it appears the case conference was not set at a time and place agreeable to the parent. However, the mother did attend this case conference, which negates this violation.

The School did not send a separate notice to the Student of the May 17, 2002, or May 21, 2002, case conference committee meetings, a violation of 511 IAC 7-27-2 since such notice was required when doing transition service plan for the student.

The School also failed to keep a required log of its attempts to schedule the May 17, 2002, case conference committee meeting, as required under 511 IAC 7-27-2(b).

In addition, the School failed to convene the May 17, 2002, case conference committee meeting in a timely fashion, resulting in an IEP past the one-year requirement for a timely case conference committee meeting as required under Article 7. Although there was testimony of problems in scheduling the case conference committee meeting (the mother needed to contact an attorney or have attorney there), that did not absolve the School of its obligation to schedule and hold the case conference committee meeting within one year of the previous IEP.

The IHO applied the two-prong test for the legal adequacy of an IEP: (1) Was the IEP developed in accordance with Article 7?; and (2) Was the IEP reasonably calculated to enable the Student to receive educational benefit?

He determined there was a significant, underlying procedural violation in the May 9, 2001, IEP. If the IEP's intent was to place the Student back at his home school, then both a general education and special education teacher at his home school should have been in attendance at the case conference. Neither attended this case conference. If it were not the intent to place the Student back at his home school, then a case conference should have been convened after it was determined he was going back to his home school.

In addition, there were various substantive violations in the May 9, 2001, IEP, including: inaccurate statement of present level of performance in math; the IEP failed to state how the student's disabilities affected his involvement and progress in a general education curriculum (this statement is required to describe problems that interfere with the student's education so that annual goals can be developed. The only problems stated were that the student may seek to manipulate and be distractable); the individual transition plan was insufficient in that it failed to state the Student's courses of study necessary to meet the student's transition plan; the extent of the student's participation with other students was ambiguous (the least restrictive environment statement required special education full time because the student needs the support of a special education classroom, yet the IEP called for six general education classes); the failure to indicate whether ESY was needed; and the BIP was developed prior to the date of the FBA.

If the IEP were written with the intent for the Student to attend the Student's home school, the IHO concluded, without including a safeguard allowing the student to be placed back in a small, structured classroom, then the IEP was not calculated to confer meaningful educational benefit. If the IEP were written with the intent for the student to attend the same school he was attending at the end of the 2000-2001 school year, and included a safeguard allowing the student to be placed back in a small, structured classroom, then the IEP may have been calculated to confer meaningful educational benefit but the numerous substantive violations undermines such a conclusion. (IHO's Conclusion of Law No. 9).

The IHO, in Conclusion of Law No. 10, found: “With all of the various substantive and procedural errors and as implemented, the May 9, 2001, IEP was not calculated to confer educational benefit. Clearly, based upon the Student’s problems and grades as the 2001-2002 school year advanced, this was proven out. The Student failed numerous classes with the Student’s mother contacting the TOR with concerns about the Student’s grades, but the TOR did nothing to improve the situation. The TOR testified as to the Student’s inattention, irresponsibility, and declining grades, but did not call a case conference committee meeting to address these problems.

“The LRE for the Student requires more special education instruction than six general education courses, especially when the general education teachers are unaware of the Student’s specific educational disabilities and BIP, and the TOR was a first-year special education teacher with a limited license during the 2001-2002 school year.

“The LRE was not changing the Student’s educational program after only a few months (February, 2001 to May, 2001) from a very structured program to an almost totally general education program, unless the safeguard of placing the Student back into the small, structured program he had previously attended was written into the student’s IEP.”

As to the issue regarding needed evaluations and testing (see Issue No. 4, *supra*), the IHO observed that this issue appeared to relate to the questioning by the School at the due process hearing as to whether the student was, in fact, bi-polar. However, the testimony of many of the School’s own witnesses did not appear to question this diagnosis. Further, the Student was and continues to be eligible for special education services under the emotional disability classification, and the School must meet the educational needs of the student regardless of the specific diagnosis. The case conference committee meeting had adequate information to develop an appropriate IEP for the student on May 9, 2001, but did not do so. At the due process hearing, the School continually raised the issue of the mother not voluntarily turning over the Student’s medical records. However, the mother did execute releases for the medical information on May 18, 2002, when requested to do so by the School. The IHO concluded:

“If this issue relates to the failure of the School to find and determine the Student to be eligible for special education services prior to February 13, 2001, based upon the Student’s prior educational and behavioral problems, there was no evidence presented by the Student that the Student’s problems interfered with his educational program to the extent that he clearly would have been eligible for special education services.”

Regarding ESY services (Issue No. 5 *supra*), the IHO stated it is difficult to determine the Student’s eligibility for ESY services on May 9, 2001, since the School had only dealt with the Student as a student eligible for special education services for three months prior to the May 9, 2001, case conference committee meeting. “It would have been total speculation as to whether the student would have had regression in skills and subsequent failure to recoup lost skills within a reasonable period of time on that date,” he wrote, adding that, “the best evidence available at that time was that the student performed adequately the first six weeks of the 2001-2002 school year, which is commonly a review

of the prior school year's work, and shows the lack of regression. Perhaps the School could have done more to help with the Student progress in math, but no regression was shown by the evidence presented (comparison of the academic levels at the end of the school year and then at the start of the next school year)."

As to Issue No. 6 (meaningful participation by the Parent and the Parent's expert), the IHO noted there was never a completion of an IEP for the Student as a result of the May 17 and May 21, 2002, case conference committee meetings. A draft IEP was provided to the Student's mother for her review prior to May 17, 2002, case conference committee meeting. It is a common practice for a School to draft parts of a student's IEP based upon the student's prior IEP to assist in the eventual discussion of the IEP. The evidence in this matter established that the Student's mother was present and was given the opportunity to make suggestions as to the IEP. The development of a student's IEP is a case conference committee meeting decision, and is not solely the parent's to determine. If the parent objects to all or parts of an IEP, this objection can be noted. Because this IEP was never finalized, the IHO stated it would be speculation as to whether the mother's and her experts' suggestions would have been incorporated into the final IEP.

With regard to the development of a BIP for the Student, the IHO concluded there was not a BIP in the Student's February 12, 2001, IEP. The Student's IEP of May 9, 2001, included a behavior intervention plan; however, the functional behavior analysis was not completed until May 30, 2001. 511IAC 7-17-8 requires that a behavior intervention plan be linked to a functional behavior analysis. Although there was testimony that there was a functional behavior analysis completed prior to February 13, 2001, it was never introduced into evidence at the due process hearing. Therefore, the contents of this functional behavior analysis are unknown. Based on the lack of a functional behavior analysis prior to the development of the behavior intervention plan, the case conference committee could not create an appropriate behavior intervention plan.

In addition, the IHO wrote: "As to the appropriateness of the behavior intervention plan contained in the May 21, 2002, proposed IEP, the IEP was never finalized, so, therefore, neither was the behavior intervention plan. It cannot be determined whether the behavior intervention plan was appropriate since the final components are unknown. If the student had continued to reside in the School, this Hearing Officer would have remanded this issue to the parties to reconvene the case conference to finalize the IEP and behavior intervention plan, but such a remand would now be superfluous."

Issue No. 8 involved staff training. The IHO concluded the School did not provide training to its staff, specifically in the area of childhood bi-polar diagnosis. "However, the School staff was trained and educated in emotional disabilities, such as attention deficit/hyper activity (ADHD) disorder and other disorders. The problem in 2001-2002 appears to have been a first-year teacher with a limited license in special education [and] not lack of training of all staff. The School should have provided more supervision of this teacher and more direct support since the case manager and school psychologist were not even aware of any problems until March 12, 2002. To require a School's staff to have training in all possible disorders would be impossible. A Student must have an IEP to meet his educational needs, not based upon a medical diagnosis."

The IHO added that the evidence established there were various monthly or bi-monthly parent-training programs related to special education where parents could attend. The parent mentor set up such training and sent out mailers of the schedule of the training. The parent mentor was available to assist parents in understanding Article 7.

Issue No. 9 involved disciplinary concerns and the possibility that sanctions were assessed for behavior that may have been a manifestation of the Student's disability. In this regard, the IHO concluded: "Based upon the discipline record for the Student and the testimony, it is unclear how many times the Student was suspended as a result of manifestations of his disability. However, it is clear that the number of suspensions were insufficient [so] as to trigger the necessity for a manifestation determination pursuant to Article 7. Further, a special education student can be removed for short periods if pursuant to his IEP. Here, the various suspensions did not constitute a pattern that effectively resulted in a change of placement for the Student."

Finally, with respect to Issue No. 10, the IHO, as previously noted, found the Student's IEP to be ambiguous in several substantive particulars (see supra). "No one monitored whether the Student ever received therapy per the IEP. Although the mother had alternative counseling and did not desire this counseling, the mother's actions do not negate the School's obligation to follow the IEP until it is changed. The School should have scheduled a case conference." The IHO added, "The IEP called for transportation but transportation was never provided, but also not needed."

Accordingly, the IHO found the Student was entitled to compensatory educational services. He issued the following eight (8) orders:

ORDERS

Based upon the findings of fact and conclusions of law, IT IS ORDERED THAT:

1. The Respondent/School shall reimburse the mother the sum of \$38.50 for copying overcharges within 45 days.
2. If the Student's present school district is unable to provide a math tutor without charge, the Respondent shall pay the cost of such tutoring for the balance of the 2002-2003 school year.
3. The Individualized Education Program dated May 9, 2001, did not provide the student with a free appropriate public education in the least restrictive environment.
4. The student is entitled to compensatory education.
5. The Respondent shall pay for a learning center program during the summer of 2003 for up to 160 hours of instruction as the same is billed to the mother.
6. It is not the intent of this Order that the mother move to the site of the learning center program and for the Respondent to be responsible for the cost of housing, per diem, or lost wages, if

any. However, the Respondent shall pay mother's costs incurred in transporting the student to and from a learning center program. The rate shall be that paid according to the Respondent's standard mileage reimbursement rate. The mother shall submit a monthly statement to the Respondent for reimbursement. The mother may want to consider a comparable learning program if one is located near the mother's residence or employment.

7. The Respondent shall reimburse the mother the sum of \$425.00 for the learning center's evaluation. The same shall be paid within 45 days.
8. The Respondent shall institute a training program for inexperienced staff in due process procedures and emotional disabilities. Further, the special education case managers shall provide more direct supervision of such staff.

The IHO provided the parties with a comprehensive statement of their administrative appeal rights.

APPEAL TO THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

The School, pursuant to 511 IAC 7-30-4(i), timely requested on March 17, 2003, an extension of time within which to prepare and file its Petition for Review. In support of its Motion, the School noted the transcript alone from the seven days of hearing exceeded 2,000 pages; as a consequence, additional time would be needed to file the Petitioner for Review.

The Board of Special Education Appeals (BSEA) granted the request and issued an Order to his effect on March 19, 2003, granting the School an extension of time to and including April 4, 2003, to file its Petition for Review, with the time frame for the BSEA to review same and issue a written decision established as May 5, 2003.

The School timely filed its Petition for Review on April 4, 2003. The complete record from the hearing was photocopied and provided to the BSEA members on April 7, 2003.

The BSEA, on April 14, 2003, notified the parties it would review this matter without oral argument and without the presence of the parties. Review was set for April 28, 2003, in the State House offices of the Indiana Department of Education.

The Student, on April 14, 2003, timely filed his Response to the Petition for Review. The School responded to this Response on April 21, 2003. The BSEA received and considered all these documents.

Petition for Review

The School objected to the IHO's overarching conclusion, styled as "Remedy" in his written decision, that the Student was entitled to compensatory educational services. The School also objected to the IHO's Orders Nos. 3-7 inclusive, which determined the May 9, 2001, IEP did not provide the Student

with a FAPE in the LRE; that the Student was entitled to compensatory educational services; that the School is to pay for a summer ESY program by a private provider; and that the School is to reimburse the Parent for the cost of an outside evaluation.

The ESY program is predicated upon an evaluation conducted by a private entity that is engaged commercially in providing certain educational support services to students generally. The ESY program, the school asserts, is directed more to the Student's reading comprehension, which was not an area of particular deficit. The School cites, in support of this argument, the Student's progress reports and the most recent ISTEP+ scores from the 8th Grade (IHO's Finding of Fact No. 43).

The School also objected to the IHO's determination that it failed to provide the Student with his own Notice of the Case Conference Committee when needed transition services would be discussed. The School apparently argues in the alternative that, even if it failed to comply with the requirement of 511 IAC 7-27-2(c)(2), this failure is technical in nature and "irrelevant" because the Student would not have attended the Case Conference Committee in any case, per the mother's wishes. The School also dismisses as "irrelevant" the IHO's determination that its failure to maintain a log of its attempts to schedule a case conference committee during May of 2001 constituted a violation of 511 IAC 7-27-2(b) because the Parent attended the meetings that were scheduled.

Objection is also made to the IHO's determination the School failed to convene a case conference committee and review on at least an annual basis, and revise if necessary, the Student's IEP. 511 IAC 7-27-7(d). (The School theorizes as to the reasons why the CCC meetings were not conducted, but admits that it could not prove its theories. The BSEA must rely upon the record in its deliberations and cannot entertain conjecture or speculation.)

The School also objects to the IHO's Conclusion of Law No. 7, finding the May 9, 2001, IEP deficient in several respects, but particularly with regard to identifying where the IEP would be implemented. The School argues that the uncertainty was created by the unsettled residency plans of the Parent and Student. The School also objects to the IHO's determination that the May 9, 2001, IEP contained an inaccurate statement of the Student's present level of math performance. Additionally, the School objects to the other deficiencies noted by the IHO in the May 9, 2001, IEP, notably the failure of the School to state how the Student's disabilities affect his involvement and progress in the general education curriculum, 511 IAC 7-27-6(a)(1)(A); to develop a transition plan that states the Student's courses of study necessary to meet the Student's transition plan, 511 IAC 7-27-6(a)(9), 511 IAC 7-28-3(a),(b); to state unambiguously the extent of the Student's participation with other students, 511 IAC 7-27-6(a)(6), 511 IAC 7-27-9; to state whether the Student required ESY services, 511 IAC 7-27-6(a)(8); and to develop, implement, and revise the Student's BIP in accordance with Article 7, 511 IAC 7-17-8, 511 IAC 7-27-4(a)(8), 511 IAC 7-27-4(c)(3), 511 IAC 7-27-6(a)(12).

The School objected to the IHO's decision regarding Issue No. 10, where he found the School failed to monitor whether the Student ever received the therapy services required by his IEP. The School argues that although the IEP described therapy services as a related service for the Student, the Parent rejected these services in favor of privately obtained therapy services. Lastly, the School objected to Finding of Fact No. 36 [#34 in original] as a misstatement of the record.

Response to the Petition for Review

The Student, in his Response, argued the School failed to articulate any basis for which the BSEA could take action, specifically, failing to state whether any contested portions of the IHO's decision was arbitrary and capricious; an abuse of discretion; contrary to law, contrary to a constitutional right, power, privilege or immunity; in excess of the jurisdiction of the IHO; reached in violation of established procedure; or unsupported by substantial evidence. See 511 IAC 7-30-4(j). The Student also disagreed that technical violations of Article 7 procedures are irrelevant or that alternative interpretations of the IHO's conclusions are warranted where the record amply supports the IHO's decisions.

The School's Response

The School responded to the Student's Response, indicating that its Petition for Review meets the requirements of 511 IAC 7-30-4(d) with regard to the specificity necessary for initiating such an administrative appeal. There is no requirement the School specifically state *a* reason for reversal where it states with particularity the areas of disagreement and the portions of the record that support its arguments. The School also argues the Student misstated the record in his Response.

REVIEW BY THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

The Board of Special Education Appeals (BSEA) convened on April 28, 2003, in the State House Offices of the Indiana Department of Education. All three members were present. The record had been reviewed in its entirety, as well as the School's Petition for Review, the Student's Response thereto, and the School's subsequent response to the Student's Response. In consideration of the arguments of the parties and the record as a whole, as well as the standard for administrative review of an IHO's written decision, the following Combined Findings of Fact and Conclusions of Law are determined.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The BSEA is a three-member administrative appellate body appointed by the State Superintendent of Public Instruction pursuant to 511 IAC 7-30-4(a). In the conduct of its review, the BSEA is to review the entire record to ensure due process hearing procedures were consistent with the requirements of 511 IAC 7-30-3. The BSEA will not disturb the Findings of Fact, Conclusions of Law, or Orders of an IHO except where the BSEA determines either a Finding of Fact, Conclusion of Law, or Order determined or reached by the IHO is arbitrary or capricious; an abuse of discretion; contrary to law, contrary to a constitutional right, power, privilege, or immunity; in excess of the IHO's jurisdiction; reached in violation of established procedure; or unsupported by substantial evidence. 511 IAC 7-30-4(j). The School timely filed a Petition for Review. The BSEA has jurisdiction to determine this matter. 511 IAC 7-30-4(h).

2. The BSEA notes that a number of so-called “complainable” issues are involved in this matter; that is, a number of allegations of procedural lapses on the School’s part were raised and addressed accordingly by the IHO. The IHO had jurisdiction to decide these matters, 511 IAC 7-30-2(1), as does the BSEA by extension. It should be noted that any decision with respect to a complaint issue in this dispute is based solely upon facts in this dispute and is binding upon the parties to this extent. The decision will not apply in the general manner that a complaint investigation report issued under 511 IAC 7-30-2 will apply.
3. The IHO afforded all parties the due process procedures made available pursuant to 511 IAC 7-30-3.
4. Any Finding of Fact not contested by the School is hereby incorporated by reference from the stated Findings of Fact included *supra*.
5. Finding of Fact No. 5 is based principally on a psychological assessment conducted on July 17, 2000. The IHO wrote, in relevant part: “The Student was diagnosed with attention deficit hyperactivity disorder, intermittent explosive disorder, and depressive disorder. Further, the assessment did not rule out psychosis or bi-polar I disorder, mixed.” The psychological assessment (Petitioner’s Exhibit P-122), in reality, did rule out psychosis not otherwise specified (NOS) and Bipolar I Disorder, mixed. There was evidence of some psychosis but the IHO’s error in this regard is not considered a substantive error. Nevertheless, Finding of Fact No. 5 is amended to reflect the referenced psychological assessment did rule out psychosis NOS and Bipolar I Disorder, mixed.
6. The School argues that the only needed transition services for the Student was its statement the Student would be working towards a diploma. The School asserts this is a sufficient statement. The BSEA disagrees. 511 IAC 7-28-3(a) recognizes the increasing complexity of academic offerings at the secondary level, notably, but without limitation, the Academic Honors Program, the Core 40 diploma, technical preparation courses (commonly called “Tech Prep” courses), Advanced Placement courses, and similar career considerations that may lead to post-secondary education or end with the attainment of the diploma. The selection of a diploma track carries with it other variables, including scheduling, increasingly during the summer, of core curricular requirements in order to meet the ever-expanding credit requirements necessary for graduation within a standard four-year secondary experience. A simple statement the Student will be on a diploma track is insufficient to satisfy Article 7. The IHO’s decision in this regard (Finding of Fact No. 10) is sustained.
7. Although the School objects to the IHO’s determination that it failed to provide the Student with a separate Notice because the Case Conference Committee would be discussing needed transition services, Article 7 does require the School to provide such separate Notice. The BSEA is loathe to state that any procedural non-compliance by a public agency can be considered *de minimis*, but under these circumstances (and in consideration as to whether a procedural lapse resulted in a denial of FAPE), given the Parent’s stated desire the Student not attend and the multiple references to the possibility of the Student’s participation in the Notice

to the Parent, the BSEA will not support the citation of the School for violating this Article 7 provision. This procedural lapses did not result in or aide in the denial of FAPE to the Student.

8. The BSEA disagrees with the School that its failure to maintain a log of contacts is irrelevant. In a typical complaint investigation, it is the responsibility of the public agency to demonstrate its compliance with the requirements of Article 7. In this case, the School could not do so, at least on an objective basis, and the IHO properly found the School violated Article 7.
9. The School cannot shift its responsibility for IEP development to the Parent such that it can avoid the required specificity of an IEP. Although the School attempts to shift such responsibility by blaming the Parent for the confusion that occurred relative to the Student's 8th grade year, where the Student returned to his home school, this responsibility remains with the School. When it became apparent the Student was not moving to another school district, the School should have reconvened the CCC. It did not. The lack of specificity in the IEP resulted in confusion. Ambiguities in an IEP are not construed in favor of the entity responsible for its creation and implementation. Accordingly, the IHO's decision regarding this procedural violation resulting from the May 9, 2001, IEP is sustained.
10. The critical Conclusion of Law by the IHO is the one where the additional violations in the May 9, 2001, IEP were considered "substantive." The School is correct that the IHO erred by finding the IEP contained an "inaccurate statement of present level of performance in math." His Finding of Fact No. 31 [#29 in original] indicated the Student had a rather static grade equivalent of 4.6 for math performance. There was no evidence to indicate this was an inaccurate statement. Accordingly, the BSEA reverses the IHO's statement in this regard.
11. The BSEA, however, sustains the IHO's other determinations of substantive violations that appear in the May 9, 2001, IEP. The IEP failed to address how the student-specific disabilities will affect his involvement and progress in the general education environment. As noted previously, the transition plan is wholly inadequate. The IEP indicates participation primarily in the general education environment but also indicates the Student requires a full-time special education placement. The School failed to indicate whether ESY services were necessary, and the School could not demonstrate the Student's BIP was based upon an FBA, nor could it demonstrate the BIP was revised based upon the FBA conducted after the BIP was initially developed. These are not considered trivial matters, and bear a direct relationship to the IHO's conclusion the Student was denied a FAPE in the LRE.
12. The School also objects to the IHO's determination the School failed to monitor whether the Student ever received the therapy services identified as a "related service" in his IEP. The School identified the therapy services as a "related services." Although the Parent rejected these school-provided services in lieu of privately obtained services, these services still remained on the IEP as "related services." The School asks what it should have done. The IHO stated succinctly that the School "should have scheduled a case conference." The BSEA finds that the School did not adequately coordinate the privately obtained therapy services with the special education services it provided the Student, even though these services were

intended to support the special education services. The lack of coordination resulted in a direct detriment to the Student. There is no indication the Parent would have refused cooperation or rejected the sharing of information. The School simply did not monitor the provision of this service, nor did it coordinate it with the special educational services the related service was to support. The IHO's decision in this regard is sustained.

13. The School objects to the IHO's Finding of Fact No. 36 [#34 in original], specifically with regard to the IHO's characterization of the recommendations for educational programming. The IHO stated in relevant part that the child psychologist "recommended a structured educational setting with a one-on-one aide three hours per day and a tutor in his four major subjects two times per week for forty-five to sixty minutes per week...He also believed that ESY was a wise choice for the student in math. He proposed six weeks of four to five days per week with two to three hours per day of instruction." A review of the record, notably Petitioner's Exhibit No. 137, indicates, *inter alia*, the child psychologist did recommend resource assistance, assistance from a one-to-one classroom aide, certain accommodations for standardized testing, a highly structured and regimented environment, and continued therapy services. The child psychologist did not recommend a one-to-one aide three hours a day nor did he recommend the specific tutoring attributed to him by the IHO. Accordingly, Finding of Fact No. 36 will be amended to remove the reference to "a one-on-one aide three hours a day and a tutor in his four major subjects two times per week for forty-five to sixty minutes per week." The child psychologist did make reference to the general education environment, but the more relevant statement of the psychologist was with respect to the Student's need for a structured environment.
14. The IHO correctly identified the two-prong test for determining whether an IEP provides a FAPE to a Student. Where an IEP contains sufficient numbers of substantive procedural violations, as in this case, the denial of FAPE is conclusive without having to determine whether the IEP conferred any meaningful educational benefit to the Student. Accordingly, the IHO's Orders Nos. 3 and 4 are sustained: The May 9, 2001, IEP did not provide the Student with a FAPE in the LRE, and the Student is entitled to compensatory educational services. In addition, the IHO's Orders No. 1 and No. 8 (neither contested) and No. 2, regarding math tutoring, are sustained as supported by the record.
15. The IHO's Orders Nos. 5, 6, and 7 inclusive are overruled. Although the Student is entitled to compensatory educational services, the record does not support that the "learning center program" described in Orders Nos. 5 and 6 is actually appropriate to his needs. This program addresses areas that are not otherwise identified as areas of deficit of the Student. Order No. 7 orders reimbursement for an independent evaluation. However, the Parent did not indicate to the School that she disagreed with the School's evaluations or that she wished for the School to pay for an Independent Educational Evaluation. Accordingly, the School is not financially obligated to pay for the learning center's evaluation.
16. There is little question that, beginning with the May 9, 2001, IEP, chaos ensued. His TOR was unaware she would have him on her caseload. The TOR was inadequately trained and poorly

supported in the discharge of her responsibilities. The lack of communication internally and externally, even after reconvening on March 12, 2002, and the descriptions of the Student's passive and aggressive behavior directly affecting educational services with no follow-up, compound the deficiencies noted by the IHO in the May 9, 2001, IEP. Behavior was identified early on as the chief impediment to the Student's educational progress, but the School failed to coordinate behavioral interventions.

ORDERS

Based on the Foregoing, the Board of Special Education Appeals now issues the following Orders by unanimous agreement:

1. Those Orders of the Independent Hearing Officer not otherwise contested are hereby sustained.
2. The School is to provide Extended School Year services to the Student during the Summer of 2003. The BSEA is aware the Student is presently enrolled in another school district that is not a party to this dispute. Accordingly, the School shall coordinate with the current school district to discuss within the framework of the Student's case conference committee the extent and need for ESY services. ESY services, as compensatory educational services in this case, are those services necessary to place the Student back in the position he would have been but for the failure of the School to devise a procedurally appropriate IEP and appropriately implement it, as noted above in the Combined Findings of Fact and Conclusions of Law. The BSEA expresses no position on the use of private or public resources to provide these services, whatever they may be. However, whatever resources are used, the School shall be financially responsible for such services.
3. Any other issue or assertion not otherwise addressed above is deemed overruled or denied, as appropriate.

DATE: May 5, 2003

/s/ Cynthia Dewes, Chair
Board of Special Education Appeals

APPEAL RIGHT

Any party aggrieved by the decision of the Board of Special Education Appeals has thirty (30) calendar days from the receipt of this decision to seek review in a civil court with jurisdiction, as provided by 511 IAC 7-30-4(n) and I.C. 4-21.5-5-5.